

HR Weekly Podcast
June 17, 2015

Today is June 17, 2015, and welcome to the HR Weekly Podcast from the State Human Resources Division. This week's topic discusses a recent United States Supreme Court decision concerning religious accommodation.

In June 2008, 17-year old Samantha Elauf applied for a position with an Abercrombie and Fitch store and was subsequently selected for an interview. During the interview with the store's assistant manager, Ms. Elauf, a practicing Muslim, wore a hijab, or headscarf, "consistent with her understanding of her religion's requirements." The store's assistant manager gave Ms. Elauf a rating that qualified her to be hired but was concerned that her headscarf would conflict with Abercrombie and Fitch's "Look Policy" which prohibited "caps." The assistant manager sought guidance from the store's manager and, when she got no response, from the district manager. The assistant manager told the district manager that she believed Ms. Elauf wore the headscarf because of her faith. The district manager directed the assistant manager not to hire Ms. Elauf because the headscarf would violate the Look Policy, "as would all other headwear, religious or otherwise." Ms. Elauf filed a complaint with the Equal Employment Opportunity Commission, or EEOC, who filed suit on Ms. Elauf's behalf alleging a violation of Title VII of the Civil Rights Act of 1964, which prohibits a prospective employer from refusing to hire an applicant because of the applicant's religious practice when the practice could be accommodated without undue hardship.

The district court sided with the EEOC but the Tenth Circuit Court of Appeals reversed finding that employers are only liable for a failure to accommodate when an applicant notifies the employer of the need for an accommodation. The EEOC subsequently appealed to the United States Supreme Court.

Abercrombie and Fitch argued that an applicant must first demonstrate that an employer had actual knowledge of the applicant's need for an accommodation in order to show disparate-treatment based on the applicant's religion. The Court disagreed noting that Title VII's disparate-treatment provision requires that applicants demonstrate that they were not hired "because of" their religion, including a religious practice, and that this "because of" standard is "understood to mean that the protected characteristic cannot be a 'motivating factor' in an employment decision." Therefore, the Court found that Ms. Elauf only had to demonstrate that the need for an accommodation was a motivating factor in Abercrombie and Fitch's decision not to hire her.

Based on the assistant manager's discussion with the district manager, she clearly believed that Ms. Elauf wore the headscarf due to her faith and the district manager determined that no accommodation would be made for the headscarf and it was prohibited as were all other head coverings, "religious or otherwise." The fact that Abercrombie and Fitch was not informed by Ms. Elauf that she was Muslim and would require an accommodation so that she could wear the headscarf in accordance with her

faith was immaterial since the assumption that this was the case was a motivating factor in the decision not to hire her.

Abercrombie and Fitch further argued that a neutral policy, such as its “Look Policy,” cannot be “intentional discrimination” as required to demonstrate a disparate-treatment claim. Abercrombie and Fitch argued that since Ms. Elauf was treated in accordance with the “Look Policy,” as were all employees regardless of their religion, the decision not to accommodate her headscarf could not be intentional discrimination. Again, the Court disagreed noting that Title VII does not demand “mere neutrality with regard to religious practices” but gives these practices favored treatment. The Court found that Title VII requires that “otherwise-neutral policies give way to the need for an accommodation.” The Court reversed the Tenth Circuit’s ruling and remanded the case for further consideration in accordance with its opinion.

As demonstrated by the Court’s decision, employers who make hiring decisions based on the assumption that an applicant will need a religious accommodation may face a discrimination claim even if applicants have not informed the employer of their religion or that an accommodation may be needed. The best practice is to make an employment offer to the most qualified applicant without consideration of what, if any, accommodations may be needed. After a job offer is made the applicant is responsible for making the employer aware of any religious accommodation that may be needed and, through an interactive process, the employer must determine if the accommodation can be made without resulting in an undue hardship. It is important to remember, however, that the Court ruled in this case that an employer may not simply rely on an otherwise neutral policy, like a dress code policy, to deny an employee’s request for an accommodation. Thank you.